IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 21, 2005 Session

STATE OF TENNESSEE v. DANIEL E. POTTEBAUM, SR.

Appeal from the Criminal Court for Davidson County
No. 2002-C-1808 Cheryl Blackburn, Judge

No. M2004-02733-CCA-R3-CD - Filed May 5, 2006

The Defendant, Daniel E. Pottebaum, Sr., was convicted by a Davidson County jury of two counts of rape of a child, two counts of aggravated sexual battery, and one count of assault. For these convictions, the Defendant received an effective seventy-four-year sentence in the Department of Correction. In this appeal as of right, the Defendant presents the following issues for our review: (1) whether the trial court erred by denying certain motions in limine regarding prior allegations of sexual abuse; (2) whether the trial court erred in ruling that, if the Defendant chose to testify, his prior felony conviction for escape would be admissible to impeach his credibility; (3) whether the trial court erred by denying his motion to dismiss the indictment based upon the Department of Children's Services' failure to preserve evidence; (4) whether it was error to permit the State to play a taped telephone conversation between the Defendant and the victim's mother; (5) whether the trial court erroneously permitted the State to ask "open-ended" questions; and (6) whether his sentence was improperly enhanced in violation of Blakely v. Washington, 542 U.S. 296 (2004). Because the Defendant should have been allowed to impeach the victim by cross-examining her about the prior accusation of sexual abuse and because the tape was erroneously admitted, the judgments of conviction are reversed, and the case is remanded for a new trial.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

Mark Scruggs, Nashville, Tennessee, for the appellant, Daniel E. Pottebaum, Sr.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Brian Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On December 3, 2001, a Davidson County grand jury indicted the Defendant for two counts of rape of a child and one count of assault. A superceding indictment was returned on September 20, 2002, for two counts of rape of a child, two counts of aggravated sexual battery, and one count of assault.

The victim, J.P.,[1] was ten years old at the time of trial, Emily Pottebaum was her mother, the Defendant was her father, and she had three brothers, Daniel Pottebaum, Jr., Andrew Geary, and Dwight Geary. The evidence presented at trial, viewed in the light most favorable to the State, established that the victim was sexually abused over a span of about a month in 2000, beginning before her seventh birthday, April 12, and ending sometime in May.

The victim explained that, when she was "six years old just about ready to turn seven[,]" the first sexual encounter with the Defendant occurred in her bedroom. She stated that the Defendant came into her bedroom, pulled her pants down, and started "rubbing on [her] private part." During this time, the Defendant had his pants down around his ankles and asked the victim if it felt good. The victim testified that, after a few minutes, she asked him to stop, and he complied.

The victim stated that the second incident began in the living room of her home. She testified, "He comes in and sits next to me and then he says to go up to [my] room. And then I go up to my room and I turn on the T.V. and start watching T.V. and then he comes up to my room." Then the Defendant instructed her to lie down on the bed, pulled her pants down, and started "licking her private part." The Defendant had his clothes on during this encounter. According to victim, the Defendant stopped because she "push[ed] his head back . . . and then [he] fell back." She testified that "he did it too hard and made [her] private part hurt" and that this incident occurred after her seventh birthday.

The victim described a third occasion when she and the Defendant were alone in the living room. According to the victim, the Defendant pulled her pants down and rubbed her genitalia. This incident occurred after her seventh birthday, and the Defendant remained clothed.

A fourth sexual encounter occurred after the Defendant ordered the victim to go into her mother's room. Once inside the room, the Defendant pulled his pants down and asked the victim if she "want[ed] to touch his private parts[.]" The victim responded no, but the Defendant tried to force her to put her mouth on his penis. The victim testified that she resisted; however, her "lips accidentally touch[ed] it." The Defendant then attempted, unsuccessfully, to put the victim's hand on his penis.

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[1] In order to protect the identity of minor victims of sexual abuse, it is the policy of this Court to refer to the victims by their initials. State v. Schimpf, 782 S.W.2d 186, 188 n. 1 (Tenn. Crim. App. 1989).

The victim testified that, during these incidents, the Defendant repeatedly told her not tell anyone because he might "go to jail." The victim stated that she told her mother about the abuse on Mother's Day, May 14, 2000, and in response, her mother took her over to her aunt's house where the police were called.

Emily Pottebaum, the victim's mother, testified that the Defendant came to live with the family for a few weeks in 2000. Ms. Pottebaum stated that the victim's bodily functions became incontinent during this time period.

According to Ms. Pottebaum, she and the Defendant were involved in an argument on May 12, 2000. She stated:

> We were fighting and he was drunk, so we were fighting, as usual, when he drinks, and he hit me, and he hit me again, and I asked him if he was done, and he hit me again. I was holding my head down so he wouldn't hit me in the face, so that the kids wouldn't know that he had been hitting me. And he hit me again, and I asked him if he was done, and he hit me again as I held my head down so that my face was covered. . . . And I asked him again if he was done, and he hit me one more time, and it was over with at that point.

Photographs, taken following the assault, showed bruises on Ms. Pottebaum's face and were entered into evidence.

Two days later, on the morning of May 14th, the victim went outside "in her T-shirt and underwear." Ms. Pottebaum testified that the Defendant caught the victim outside and spanked her. Later that same day, the victim informed her of the sexual abuse by the Defendant. She testified that, upon leaving the residence with the victim, they encountered the Defendant, and she told him that they were going over to a friend's house. Upon arrival at the friend's house, Ms. Pottebaum phoned the police and reported the domestic assault and sexual abuse. According to Ms. Pottebaum, Detective Alan Shane Finchum, formerly of the Youth Services Division of the Metro Police Department, and Stanley Cook, a social worker with Child Protective Services, came to the residence to investigate the allegations. Mr. Cook interviewed the victim regarding the sexual abuse.

Approximately three days later, Ms. Pottebaum took out a warrant against the Defendant based upon the domestic assault. Ms. Pottebaum stated that she did not see the Defendant again after May 14, 2000, because he fled Nashville and went to Kentucky. She confirmed that she participated in a pretext phone call with the Defendant in an effort to get him to return to Nashville and address the allegations of sexual abuse.

In April of 2002, Holly Gallion, a pediatric nurse practitioner with Our Kids Center, examined the victim, and her examination of the victim revealed a "normal genital examination." At this time, the victim was also interviewed by social worker Phyllis Thompson of Our Kids Center. As a witness for the Defendant, Ms. Thompson testified that she was informed by the victim's

mother that the victim "will sometimes lie about things if she thinks it's going to get her out of trouble[.]" Ms. Thompson also stated that the victim did not tell her that she had been "licked in her private area by her father."

The Defendant testified on his own behalf and denied ever inappropriately touching the victim. At the conclusion of the two-day trial, the jury found the Defendant guilty as charged on all counts.

A sentencing hearing was held on May 26, 2004. Following the presentation of evidence, the trial court sentenced the Defendant to an effective sentence of seventy-four years[2] in the Department of Correction. In June of 2004, the Defendant timely filed a motion for new trial and, in July, he filed a motion for re-sentencing. The trial court denied the Defendant's motions. This appeal followed.

ANALYSIS

I. Motions in Limine "No. 1 and No. 2"

The Defendant argues that the trial court erred by denying certain motions in limine. On February 11, 2004, the Defendant filed, "Motion in Limine No. 1: Admissibility of Alleged Victim's False Claim of Sexual Abuse" and "Motion in Limine No. 2: Admissibility of Alleged Victim's Mother's Claim of Sexual Abuse of Herself and [the Victim.]" It appears from the record that hearings on these motions were held on February 25th and 27th of 2004. We note that the Defendant has failed to include the hearing transcripts in the record before this Court. It is the duty of the appealing party to prepare an adequate record for appellate review. Tenn. R. App. P. 24(b). "When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993). Notwithstanding, we elect to address the Defendant's claim.[3]

The Defendant relies primarily on State v. Wyrick, 62 S.W. 3d 751 (Tenn. Crim. App. 2001), in which this Court stated as follows:

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[2] The Defendant was sentenced to twenty-five years as a child rapist for each rape of a child conviction and twelve years as a violent offender for each aggravated sexual battery conviction. He received a sentence of eleven months and twenty-nine days as Range I, standard offender for the assault conviction. The sentences for rape of child and aggravated sexual battery were to be served consecutively to each other, and the assault sentence was to be served concurrently with the other sentences, resulting in an effective sentence of seventy-four years in the Department of Correction.

[3] The State argues that Defendant's constitutional argument is waived. The State asserts that, for the first time on appeal, the Defendant "purports to suggest that the trial court's ruling denied him his constitutional right to confront witnesses against him and to conduct meaningful cross-examination." However, at all stages in the proceedings, the Defendant relied upon State v. Wyrick, 62 S.W.3d 751 (Tenn. Crim. App. 2001), which includes an analysis of evidentiary rules and constitutional rights of confrontation and due process. Accordingly, we decline to find waiver of the issue.

> The resolution of this issue involves the interplay between the evidentiary rules governing relevance and those governing the impeachment of witnesses. We begin by noting that a defendant's constitutional right to confront the witnesses against him includes the right to conduct meaningful cross-examination. Pennsylvania v. Ritchie, 480 U.S. 39, 51, 107 S. Ct. 989, 998, 94 L.Ed. 2d 40 (1987); State v. Brown, 29 S.W.3d 427, 431 (Tenn. 2000); State v. Middlebrooks, 840 S.W.2d 317, 332 (Tenn. 1992). Denial of the defendant's right to effective cross-examination is "'constitutional error of the first magnitude'" and may violate the defendant's right to a fair trial. State v. Hill, 598 S.W.2d 815, 819 (Tenn. Crim. App.1980) (quoting Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 1111, 39 L. Ed. 2d 347 (1974)). "The propriety, scope, manner and control of the cross-examination of witnesses, however, rests within the sound discretion of the trial court." State v. Dishman, 915 S.W.2d 458, 463 (Tenn. Crim. App. 1995); Coffee v. State, 188 Tenn. 1, 4, 216 S.W.2d 702, 703 (Tenn. 1948). Furthermore, "a defendant's right to confrontation does not preclude a trial court from imposing limits upon cross-examination which take into account such factors as harassment, prejudice, issue confrontation, witness safety, or merely repetitive or marginally relevant interrogation." State v. Reid, 882 S.W.2d 423, 430 (Tenn. Crim. App. 1994). This court will not disturb the limits that a trial court has placed upon cross-examination unless the court has unreasonably restricted the right. Dishman, 915 S.W.2d at 463; State v. Fowler, 213 Tenn. 239, 253, 373 S.W.2d 460, 466 (Tenn. 1963).
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> We also recognize that the "Sixth Amendment and the Due Process Clause of the Fourteenth Amendment clearly guarantee a criminal defendant the right to present a defense which includes the right to present witnesses favorable to the defense." Brown, 29 S.W.3d at 432; Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049, 35 L. Ed. 2d 297 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). Although this right is critical, at times it "'must yield to other legitimate interests in the criminal trial process,'" including "'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" Brown, 29 S.W.3d at 432 (quoting Chambers, 410 U.S. at 295, 302, 93 S. Ct. at 1046, 1049).

Wyrick, 62 S.W. 3d at 770.

A. Prior Allegation of Sexual Abuse

The Defendant challenges the trial court's exclusion of evidence pertaining to a claim of sexual abuse by the victim against her brother, Dwight Geary. Specifically, he states:

> [The victim] had fabricated the claim against her father, [the Defendant], and she fabricated the claim of abuse against her brother, Dwight Geary. The report of Phyllis Thompson substantiated the Defendant's claim that [the victim] fabricated

> the allegation of abuse against Dwight Geary. The Court would not allow the Defendant to explore this issue with either [the victim] or Phyllis Thompson.

The Defendant further argues that the evidence is relevant to show "motive" of the victim, i.e., "the false allegation against this Defendant was made for the purpose of getting both individuals out of the house after conflicts arose in their respective relationships."

Rule 412, Tennessee Rules of Evidence, provides that evidence of specific instances of a sex offense victim's sexual behavior with persons other than the accused is inadmissible unless it is offered to rebut or explain scientific or medical evidence, to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or to prove consent if the evidence is of a distinctive pattern of sexual behavior closely resembling the accused's version of events. Tenn. R. Evid. 412(c)(4). The probative value of the evidence must outweigh its prejudicial affect on the victim. Tenn. R. Evid. 412(d)(4). In Wyrick, the victim had made a prior allegation of rape when she came home late one night and needed an excuse. Wyrick, 62 S.W.3d at 769. However, she recanted the allegation before the police were called. Id. At trial, the defendant sought to cross-examine the victim concerning this incident, but the trial court ruled he had failed to comply with the notice requirements of Rule 412. Id. On appeal, this Court held that a prior false allegation of rape was not included within the meaning of "sexual behavior" in Rule 412 and, thus, the trial court improperly excluded the evidence. Id. at 770-71.

Unlike the victim in Wyrick, the victim in the present case has not recanted her allegation that her brother Dwight Geary sexually abused her. However, in the present case, as in Wyrick, the defense strategy in introducing the evidence of a victim's prior allegation of abuse was to prove the absence of sexual activity on that particular occasion. See State v. David Gene Hooper, No. E2004-01053-CCA-R3-CD, 2005 WL 1981789, at *7 (Tenn. Crim. App., Knoxville, Aug. 16, 2005). We therefore conclude that Rule 412 does not prevent the admissibility of evidence of a victim's prior allegation of sexual abuse if the defendant is seeking to introduce the evidence to contend that the prior allegation is false. Id.

The Wyrick Court proceeded to analyze whether extrinsic evidence pertaining to the prior allegation was admissible pursuant to Rule 404(b), Tennessee Rules of Evidence.[4] Wyrick, 62 S.W.3d at 771-80. We glean from the incomplete record before this court, that the Defendant

[4] In its ruling, the trial court states that "post-Wyrick, the [supreme court] found that Rule 404(b) analysis is applicable only to the defendant in a case. State v. Stevens, 78 S.W.3d 817, 868 ([Tenn. 2002]); thus, 404(b) analysis is inapplicable to the victim in this case." Contrary to the reasoning of the trial court, Rule 404 is a rule of exclusion. If, as the trial court concludes, Rule 404 is inapplicable, then the relevant evidence would be admissible unless excluded by some other rule. In Stevens, the Tennessee Supreme Court held that Rule 404(b) does not apply when a third party defense is at issue. Stevens, 78 S.W.3d at 837. More recently, our supreme court, citing Stevens, has stated, "We have since clarified, however Rule 404(b) does not apply when a third-party defense is raised." State v. William Glenn Rogers, -- S.W.3d --, No. M2002-01798-SC-DDT-DD, 2006 WL 358567, at *16 (Tenn., Nashville, Feb. 17, 2006). This case does not involve a third-party defense. Moreover, our Court, when presented with a factual situation similar to that presented in this case, has continued to apply Rule 404(b) following Stevens. See, e.g., David Gene Hooper, 2005 WL 1981789. Thus, we conclude that Stevens is not applicable to the present situation and Rule 404(b) applies.

presumably sought to introduce as extrinsic evidence of the victim's allegation: (1) testimony of Dwight Geary[5] to establish "that said allegations are false and were made for the purpose of getting her brother out of the house because of conflicts she had with him[,]" (2) testimony of Phyllis Thompson, a social worker with Our Kids Center, regarding her report, wherein it is stated that "[the victim] denied any other inappropriate physical contact between her and her father or anyone else[,]" (3) Ms. Thompson's report or relevant portions of the report, and (4) Department of Children's Services' (DCS) records noting the allegation against Dwight Geary as "unfounded[.]"

Generally, a party may not introduce evidence of an individual's character or a particular character trait in order to prove that the individual acted in conformity with that character or trait at a certain time. Tenn. R. Evid. 404(a). In other words, a party may not use character evidence to show that a person acted in a particular way because he or she had a propensity to do so. State v. Moore, 6 S.W.3d 235, 239 (Tenn. 1999); State v. Parton, 694 S.W.2d 299, 304 (Tenn. 1985) (observing that evidence of another crime is not admissible to show that the defendant is the kind of person who would tend to commit the offense); State v. Tizard, 897 S.W.2d 732, 743 (Tenn. Crim. App. 1994) (noting that character evidence may not be used to show a propensity to act). Similarly, evidence "of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait." Tenn. R. Evid. 404(b). However, this evidence may be admitted for other purposes if relevant to some matter actually in issue in the case on trial and if its probative value is not outweighed by the danger of its prejudicial effect. Tenn. R. Evid. 404(b); Wyrick, 62 S.W.3d at 771 (citation omitted). Issues to which such evidence may be relevant include identity, motive, common scheme or plan, intent, or the rebuttal of accident or mistake defenses. Tenn. R. Evid. 404, Advisory Commission Comments; Parton, 694 S.W.2d at 302. Admissibility of other crimes, wrongs, or acts is also contingent upon the trial court finding by clear and convincing evidence that the prior crime, wrong, or act was actually committed. Tenn. R. Evid. 404(b); Wyrick, 62 S.W.3d at 771. The jury may consider evidence admitted under 404(b) as substantive evidence at trial. Wyrick, 62 S.W.3d at 771.

Before the trial court may permit evidence of a prior crime, wrong, or act, the following procedures must be met:

> (1) The court upon request must hold a hearing outside the jury's presence;
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and

[5] In the Defendant's "Motion in Limine No. 1[,]" he seeks to introduce testimony from Dwight Geary. However, we note that, on the morning of trial, defense counsel stated, "I have still not be [sic] able to locate Dwight Geary." It logically follows from this statement that Dwight Geary did not provide testimony at any stage in the proceedings regarding the allegation of sexual abuse.

> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). Provided that the trial court has complied with these procedures, this court will not overturn the trial court's decision to admit or exclude evidence under Rule 404(b) absent an abuse of discretion. State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). "However, in view of the strict procedural requirements of Rule 404(b), the decision of the trial court should be afforded no deference unless there has been substantial compliance with the procedural requirements of the Rule." Id.

A victim's accusation of a sexual offense must relate to a fact in issue at trial in order to be admissible substantively under Rule 404(b). Wyrick, 62 S.W.3d at 776-77. In the present case, the Defendant claims a similar motive by the victim to accuse him falsely of sexual abuse as she had in accusing her brother - - "getting both individuals out of the house after conflicts arose in their respective relationships." On the morning of trial, defense counsel argued:

> [T]he proof is going to show that [the Defendant,] the father, had only been there for like a month or so. He was, in essence, a visitor, just like Dwight was, and my proof would show that on that Sunday morning, she was spanked pretty harshly by [the Defendant] and she used that excuse as a way to get him out of the house[.]

Applying a Rule 404(b) analysis, the trial court concluded that the "Defendant has not shown by clear and convincing evidence that the victim in this case was or was not sexually abused by Dwight Geary or that she falsified any accusations against him." The trial court further reasoned:

> Even if there was clear and convincing evidence that the victim falsified the claim against Dwight Geary, commonality between the alleged falsification and Defendant's instant charge is lacking. . . . Defendant argues that the victim lied about Defendant abusing her, so he would have to leave the home and she did the same six months later in order for Dwight Geary to be removed from the home. The evidence presented to the Court, however, via the deposition of the victim's mother, is that at the time of the alleged abuse by Dwight Geary, he was simply visiting the home for a few days over the Christmas holiday. Prior to his Christmas visit, he had not been back to his mother's home in many months, and when he visited, he only stayed for a weekend or a couple of days. Thus, there would be no reason for the victim to lie about abuse in order [sic] have removed from the house.

The trial court then concluded that the victim's prior allegation of sexual abuse did not relate to a fact in issue at trial and was therefore inadmissible.[6] In the absence of a complete record, we decline to disturb the determination of the trial court, see State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991), and conclude that the extrinsic evidence proffered by the Defendant is inadmissible under Rule 404(b).

The Defendant also sought to cross-examine the victim about her prior false allegation of sexual abuse against Dwight Geary. Specific instances of conduct may be used to impeach a witness during cross-examination if the conduct is probative of the witness' character for truthfulness or untruthfulness. Tenn. R. Evid. 608(b).[7] If the witness denies the conduct, the party proffering the evidence must be satisfied with that response and may not seek to prove the conduct by extrinsic evidence. See id.; Wyrick 62 S.W.3d at 780. Before a witness can be questioned about the specific instance of conduct, the court, upon request, must hold a jury-out hearing "to determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry[.]" Tenn. R. Evid. 608(b)(1).

Prior false reports of crime are relevant to a witness' credibility. Wyrick, 62 S.W.3d at 780 (citing State v. Walton, 673 S.W.2d 166, 169 (Tenn. Crim. App. 1984)); see State v. Newsome, 744 S.W.2d 911, 917 (Tenn. Crim. App. 1987)). Similarly with regard to sexual offenses, the fact that a victim previously accused another of raping her is material to her charge of rape against the defendant if proof exists that the victim falsified the prior accusation. Wynick, 62 S.W. 3d at 780. (citing State v. Willis, 735 S.W.2d 818, 822 (Tenn. Crim. App. 1987)).

However, some factual basis that the prior report was false must exist before the party seeking to impeach the witness may ask about it. See Tenn. R. Evid. 608(b)(1); Wyrick, 62 S.W.3d at 781. The purpose behind requiring a reasonable factual basis before permitting an inquiry about specific instances of conduct "is to ensure that such questions are proposed in good faith, rather than in an effort to place before the jury unfairly prejudicial information supported only by unreliable rumors." State v. Nesbit, 978 S.W.2d 872, 882 (Tenn. 1998). To the extent possible, the party seeking to introduce the evidence should present extrinsic proof of the specific instance of conduct at the jury-out hearing. Id.

In the present case, the Defendant provided to the court the report of social worker Phyllis Thompson, which stated that "[the victim] denied any other inappropriate physical contact between

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[6] In the written order on the Defendant's motion to dismiss, the trial court concluded that the Defendant failed to establish that the prior accusation was false and, therefore, the evidence was excluded by Rule 412, Tennessee Rules of Evidence. Similarly, in State v. Steven Lee Whitehead, No. W2000-01062-CCA-R3-CD, 2001 WL 1042164 (Tenn. Crim. App., Jackson, Sept. 7, 2001), this Court affirmed exclusion of the evidence under Rule 412. In that case, the trial court "essentially found that the appellant failed to establish that RB's former testimony concerning the New Year's Eve rape was false." Whitehead, 2001 WL 1042164, at * 10. However, under Wyrick, the better practice for trial courts is to exclude such evidence under a Rule 404(b) analysis, i.e., "[t]he court must find proof of the other crime, wrong, or act to be clear and convincing[.]" Tenn. R. Evid. 404(b); see also Wyrick, 62 S.W. 3d at 774-75.

[7] The trial court did not address Rule 608 in its ruling.

her and her father or anyone else[,]" and DCS' records noting the allegation against Dwight Geary as "unfounded[.]" We conclude that this constitutes a good faith basis for the Defendant asking the victim whether she made a false allegation of rape against Dwight Geary to have him removed from the home. See David Gene Hooper, 2005 WL 1981789, at *8.

Additionally, the fact that the victim was a juvenile at the time of the accusation also bears upon its admissibility:

> Evidence of specific instances of conduct a witness committed while the witness was a juvenile is generally inadmissible under this rule. The court may, however, allow evidence of such conduct of a witness other than the accused in a criminal case if the conduct would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil or criminal proceeding.

Tenn. R. Evid. 608(c). Here, the conduct would be admissible to attack the credibility of an adult. Thus, the question is whether the evidence is necessary for a fair determination of the Defendant's guilt. In this case, the victim's testimony provides the only evidence linking the Defendant to the crime. Therefore, the admissibility of the prior accusation was necessary for a fair determination of the case even if the victim was a juvenile at the time she made the accusation. See Wyrick, 62 S.W.3d at 782. Thus, the Defendant should have been permitted to cross-examine the victim about the prior accusation of rape.

Not every denial of the right to cross-examine a witness in order to impeach his or her credibility rises to the level of constitutional error. Id. "[L]abeling this general credibility argument to be one of 'motive' without articulating a theory of motive or partiality does not implicate the rights carefully outlined in Davis [v. Alaska], 415 U.S. 308." Id. at 784-85 (quoting Boggs v. Collins, 226 F.3d 728, 741 (6th Cir. 2000)). While the Defendant in the present case articulated a theory of motive, the trial court found no merit to this theory. Given the incomplete record, we will not disturb the determination of the trial court. See Oody, 823 S.W.2d at 559. Accordingly, the Defendant sought to cross-examine the victim in order to make a general attack upon her credibility. The Defendant's rights under the Confrontation Clause were not violated by his inability to make a general attack upon the victim's credibility by cross-examining her about the prior accusation of sexual abuse. Wyrick, 62 S.W3d at 785.

Nevertheless, as in Wyrick, this case is strikingly similar to Dishman, 915 S.W.2d 458, in which this Court held that the circumstances compelled that the defendant be allowed full and complete cross-examination of the rape victim. Wyrick, 62 S.W.3d at 785. In Dishman, this Court observed that

> the convictions for kidnapping and rape depended almost entirely upon the truthfulness of the victim's testimony, much of which was uncorroborated. Because the credibility of the victim was a central issue, the victim's previous participation in a crime involving dishonesty was especially probative. The evidence, if admitted,

> may have changed the results of the trial. The importance of a full and complete cross-examination, under these circumstances, is so fundamental as to preclude a finding of harmless error.

Dishman, 915 S.W.2d at 464. Just as this Court found in Wyrick, we believe Dishman provides protection for cross-examination under the Defendant's right to due process. See Wyrick, 62 S.W.3d at 785. In this regard, under the circumstances existing in the present case, we conclude that the Defendant's ability to conduct a full and complete cross-examination was so important that due process prevents the failure to allow the cross-examination from being considered harmless beyond a reasonable doubt. See id.

B. Cross-Examination of the Victim's Mother

We will proceed to address the Defendant's remaining issues to provide guidance upon remand and to facilitate possible further appellate review. The Defendant next argues that the trial court "erred in not allowing the Defendant to explore on cross-examination of Emily Pottebaum her previous claims that she was sexually abused when she was younger and that [the victim] was allegedly sexually abused by her brother, Andrew, when she was eight months old in New Mexico." The Defendant argued that the "purpose of the examination is to show that Ms. Pottebaum is obsessed with the possibility of being sexually abused to the extent that she has influenced the alleged victim in this case to use it as an excuse to manipulate the legal system in an effort to hurt the Defendant in this case."

> In its order denying the motion, the trial court stated:
> The Court, in fact, held a hearing on this matter during the jury trial and found that any reference to sexual abuse against the victim's mother was inadmissible in that the mother never discussed this matter with her daughter. The Court, however, did not prohibit the Defendant from testifying that the victim's mother did discuss her own abuse in front of her daughter.
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> The Court reviewed the deposition of the victim's mother regarding possible sexual abuse committed against the victim in this case by her brother Andrew [Geary]. In her deposition, the victim's mother testified that she reported sexual abuse by Andrew that occurred while Andrew was changing the victim's diaper; the victim was eight months old at the time. The mother testified that she never discussed the incident with the victim and the victim has no knowledge of the occurrence.

The scope of cross-examination extends to "any matter relevant to any issue in the case, including credibility." Tenn. R. Evid. 611(b). Moreover, a party "may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." Tenn. R. Evid. 616. We again note that the propriety, scope, manner,

and control of cross-examination of witnesses rests within the sound discretion of the trial court. Coffee, 216 S.W.2d at 703; Dishman, 915 S.W.2d at 463.

Based upon the record before us, we conclude that the trial court did not err in limiting the Defendant's cross-examination of the victim's mother. First, according to the victim's mother, she did not discuss these matters with the victim. Second, the victim, because she was eight months old at the time, had no knowledge of the circumstances surrounding the alleged abuse by her brother Andrew. As previously stated, "a defendant's right to confrontation does not preclude a trial court from imposing limits upon cross-examination which take into account such factors as harassment, prejudice, issue confrontation, witness safety, or merely repetitive or marginally relevant interrogation." Reid, 882 S.W.2d at 430; see Wyrick, 62 S.W.3d at 770. Moreover, the trial court did not prohibit the Defendant from testifying that the victim's mother discussed her own abuse with the victim. Accordingly, we find that no error occurred.

II. Admissibility of Prior Escape Conviction

The Defendant asserts that the trial court erred in ruling that his prior conviction for escape was admissible for impeachment purposes.[8] On February 11, 2004, the Defendant filed, "Motion in Limine No. 3: Admissibility of Defendant's Criminal History." It appears from the record that this motion was heard in conjunction with the Defendant's other motions in limine on February 25th and 27th of 2004. Again, we note that the Defendant has failed to include the hearing transcripts in the record before this court. It is the duty of the appealing party to prepare an adequate record for appellate review. Tenn. R. App. P. 24(b). "When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." Ballard, 855 S.W.2d at 560. Notwithstanding, we elect to address the Defendant's claim.

The general rule is that prior convictions can be used to impeach the credibility of the accused in a criminal case who takes the stand in his own defense. See Tenn. R. Evid. 609. However, before the State is permitted to impeach an accused's credibility with prior convictions, certain conditions and procedures must be satisfied. See id. The prior conviction must be for a crime punishable by incarceration in excess of one year or for a crime involving dishonesty or false statement. Tenn. R. Evid. 609(a)(2); see also State v. Blanton, 926 S.W.2d 953, 959 (Tenn. Crim. App. 1996). The rule also mandates that the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. Tenn. R. Evid. 609(a)(3). Additionally, the State must give reasonable written notice prior to trial of the particular convictions it intends to use to impeach the accused. Id. However, a conviction is not admissible if more than ten years has elapsed between the date of release from confinement and commencement of the present action unless

[8] It appears that the trial court also permitted the State to impeach the Defendant with a 1998 burglary conviction. The Defendant does not challenge this ruling on appeal.

> the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

Tenn. R. Evid. 609(b).

In the present case, the State provided the Defendant with notice of its intended use of the Defendant's convictions prior to trial. The Defendant argues that the escape conviction is not admissible because the conviction is "well over ten (10) years old" and "had no probative value for truthfulness[.]" The State's notice describes the conviction as "No. 9286CI, Escape, 1/22/91, LaGrange, Kentucky[.]" In the record before this Court, the only evidence of a conviction similar to this description is found in the presentence report, which states, "A NCIC report reflects a charge of ret shock probator violator for the State of Kentucky in January of 1991 with a 3 year sentence." The original indictment in this case was returned on December 3, 2001. We are unable to determine from the incomplete record when the Defendant was released from confinement in connection with this crime. Moreover, it is unclear from the record whether the trial court determined that the conviction was outside of the ten-year period.[9] We note that it is quite likely that the Defendant was not released from the escape sentence prior to December of 1991 and, therefore, ten years has not elapsed between the date of release from confinement and commencement of the present action.

Thus, the issue before us is whether the trial court properly balanced the probative value of the conviction against its prejudicial effect. In State v. Mixon, 983 S.W.2d 661 (Tenn. 1999), our supreme court addressed the criteria to be considered in a Rule 609 hearing as follows:

> In determining whether the probative value or a conviction on the issue of credibility outweighs its unfair prejudicial effect upon the substantive issues, two criteria are especially relevant. A trial court should first analyze the relevance the impeaching conviction has to the issue of credibility. . . . If the conviction is probative of the

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[9] The only discussion in the record regarding the ten-year period for the escape conviction follows:

> GENERAL HOLMGREN: . . . One of the concerns the Court had was with the time period that was involved, it being what the Court perceived as beyond the ten years. I'm prepared to establish through the defendant's own statements and admissions that he was in prison for - - I believe by his statements, five years which would have tolled that - -
>
> THE COURT: For escape?
>
> . . . .
>
> GENERAL HOLMGREN: Yes. Well not - - he wasn't in prison on that charge for escape but for the burglary charge and the escape charge in total and other time periods when he was incarcerated, effectively [the Defendant] has been in custody for the vast majority of the twelve years that are at issue here.

> defendant's credibility, the trial court should secondly assess the similarity between the crime on trial and the crime underlying the impeaching conviction.

Mixon, 983 S.W. 2d at 674 (citations omitted).

As we have noted, the record does not contain a transcript of the hearing the trial court conducted on this issue. In the absence of an adequate record, we must presume that the trial court properly analyzed the issue.

Moreover, with respect to the crime of escape, this Court has upheld a trial court's determination that this crime is probative of credibility because it involves intent to purposefully violate the law. State v. Thompson, 36 S.W.3d 102, 111 (Tenn. Crim. App. 2000) (citation omitted); State v. Larry Ballentine, No. M2004-02715-CCA-R3-CD, 2006 WL 264977, at *4 (Tenn. Crim. App., Nashville, Jan. 31, 2006). Moreover, this Court has held that, even if a sentence for escape is beyond the ten-year period, the conviction can be used for impeachment purposes. Thompson, 36 S.W.3d at 111. Furthermore, the crime of escape bears no similarity to the crimes at issue. Id. Therefore, we conclude that the trial court did not err in ruling that the Defendant's conviction for felony escape could be used for impeachment. This claim is without merit.

III. Records of the Department of Children's Services

The Defendant argues that the trial court erroneously denied his motion to dismiss the charges against him. It appears from the record that hearings relating to this motion were held on March 6, 2003, and May 7, 2003; however, the Defendant has failed to include the hearing transcripts in the record before this court. It is the duty of the appealing party to prepare an adequate record for appellate review. Tenn. R. App. P. 24(b). "When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." Ballard, 855 S.W.2d at 560. Nonetheless, we elect to address the Defendant's claim.

The Defendant argues that his due process rights were violated by DCS' failure to preserve evidence "relating to accusations made by [the victim] regarding perpetrators other than [the Defendant]." Furthermore, he contends that he was materially harmed by the loss of the DCS records because such records would demonstrate that: "(1) [the victim] was sexually abused by someone other than the defendant, or (2) that [the victim] accused her brother of sexual abuse, but that her accusation was investigated by DCS and determined to be false." The following facts are taken from the Defendant's memorandum in support of his motion to dismiss:

> On May 9, 2000, [the victim] reported to her mother that her father, [the Defendant] had sexually assaulted her. Several days later, after an altercation which resulted in Ms. Pottebaum charging [the Defendant] with assault, Ms. Pottebaum reported [the victim's] allegations to State authorities. The Department of Children's Services (DCS) responded to her report by sending Stanley Cook, a social worker,

to visit with [the victim] on May 14, 2000. Mr. Cook's interview with [the victim] was memorialized in a report. . . . [The victim] and Ms. Pottebaum were later interviewed at the Our Kids Clinic on July 7, 2000. . . . In that interview, Ms. Pottebaum related that [the victim] had previously (on an unspecified date) made allegations that Dwight [Geary, the victim's brother], "licked her down there." Subsequently, the State charged [the Defendant] with rape of a child in a direct presentment filed December 7, 2001 (that presentment was superceded by the indictment listed above, filed on September 27, 2002). In response to the Motion for a Bill of Particulars, the State has specified that the offenses alleged in the above referenced indictment refer in counts one and two to cunnilingus alleged to have been performed by the defendant on [the victim] on two unspecified dates. Counts three and four are said to relate to acts of fellatio where [the Defendant] is said to have caused [the victim] to have oral contact with his penis on two unspecified dates. . . .

In attempting to investigate Ms. Pottebaum's statements to the Our Kids Social Worker that [the victim] had previously accused another male family member of having oral contact with her genital area, undersigned counsel filed a Brady motion requesting that this Honorable Court review, in camera, all records held by the Department of Children's Services relating to complaints made by [the victim]. . . . This Honorable Court issued several orders to the Department of Children's Services to provide such records. This Court also conducted several hearings regarding the status of such records and has been informed that the Department of Children's Services has lost or destroyed all memorandum and reports relating to accusations made by [the victim] regarding perpetrators other than [the Defendant]. The few existing records, made exhibits to the hearings in this matter, demonstrate that:

1. DCS computer notations, under the name of [the victim], show that the Pottebaum family began receiving Family Crisis Intervention in the Davidson County region October 21, 1997. No reports or computer entries have been located to explain this notation. Nor has any information been provided as to what type of complaint or report led to the referral in 1997.

2. An unidentified complainant reported suspected sexual abuse of [the victim] by her brother Andrew to DCS in October 1999. This complaint was marked for investigation by a social worker within 7 days of the complaint. No reports or memorandum created by the social worker have been located, and the only other information available from that investigation is that the complaint was "pended" on January 11, 2000 and "sent to another County" . . . ;

3. Reports were made on January 10, 2001 to DCS concerning allegations [the victim] made in January 2001 that Dwight [Geary] touched her vaginal area with his mouth. The case was transferred for services, but no reports have been located.

> The only other notation on the information provided by the State is that on June 20, 2001, after numerous resetting of staffing by the Child Protective Services Team (CPIT), the case was marked as unfounded . . . ;
>
> At the various hearings on this matter, representatives from the Department of Children's Services testified that the Department is an investigatory branch of state government, that all complaints of child sexual abuse are investigated through DCS rather than the police department. DCS officials further testified that DCS has the obligation to maintain records of the matters it investigates, an obligation which is shouldered by DCS social workers and their supervisors. Supervisor Valerie Cook testified that all complaints are marked according to priority and that a social worker is assigned to investigate within a set allotted amount of time. Ms. Cook further testified that social workers memorialize their interviews with child victims and that such interview notes are regularly kept as part of the DCS file. Several witnesses testified that all reports and memorandum relating to any child, regardless of type of complaint or identified perpetrator, are kept together in one physical file. Ms. Cook and other witnesses testified that though DCS does regularly destroy files, files relating to matters of child sex abuse are, by DCS policy, never destroyed.

Initially, we note that the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution afford every criminal defendant the right to a fair trial. See Johnson v. State, 38 S.W.3d 52, 55 (Tenn. 2001). As such, the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to the defendant's guilt or innocence or to the potential punishment faced by a defendant. See Brady v. Maryland, 373 U.S. 83, 87 (1963).

In State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), our supreme court addressed "what consequences flow from the State's loss or destruction of evidence alleged to have been exculpatory." Ferguson, 2 S.W.3d at 915. Specifically, our supreme court rejected the bad faith analysis required under the United States Constitution, set forth in Arizona v. Youngblood, 488 U.S. 51 (1988), and held that a broader inquiry is required under Article 1, Section 8 of the Tennessee Constitution. Ferguson, 2 S.W.3d at 914. The critical inquiry is whether a trial conducted without the lost or destroyed evidence would be fundamentally fair. Id.

A. Duty to Preserve

In resolving the question of fundamental fairness, a court must first determine whether the State had a duty to preserve the lost or destroyed evidence. Id. at 917; see also State v. Coulter, 67 S.W.3d 3, 54 (Tenn. Crim. App. 2001). "Generally speaking, the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law." Ferguson, 2 S.W.3d at 917. However,

> [w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Id. (quoting California v. Trombetta, 467 U.S. 479, 488-489 (1984)).

In his motion to dismiss, the Defendant argued that "[s]uch evidence is routinely preserved by DCS, the exculpatory nature of these reports was apparent at the time the reports were generated, and therefore was apparent prior to their loss or destruction . . . . " The State responded, "DCS is not a 'law enforcement agency' and its investigatory responsibilities are different from those assigned to police agencies, crime laboratories, and prosecutor's offices. . . . [E]xpanding . . . Ferguson . . . to cover agencies like DCS would be overly broad and result in a consequence that was not intended to be the holding of Ferguson."

The trial court concluded that DCS had a duty to preserve the lost or destroyed files in the instant case. The trial court reasoned that "DCS is an investigatory branch of the state government and that all complaints of child sexual abuse are investigated through DCS rather than the police department. Further, the Tennessee Code provides that DCS is the state agency responsible for investigating and responding to complaints of child sexual abuse." Contrary to the assertions of the State, several opinions of this Court have applied Ferguson to evidence lost or destroyed by DCS and concluded that DCS does have a duty to preserve evidence. See State v. Matthew Kirk McWhorter, No. M2003-01132-CCA-R3-CD, 2004 WL 1936389, at *26 (Tenn. Crim. App., Nashville, Aug. 30, 2004); State v. Cory James Martin, No. E2001-00914-CCA-R9-CD, 2002 WL 927427, at *5 (Tenn. Crim. App., Knoxville, Sept. 9, 2002); State v. Ammon B. Anderson, No. M2000-01183-CCA-R3-CD, 2001 WL 363984, at *5 (Tenn. Crim. App., Nashville, Apr. 12, 2001). We agree that the holding of Ferguson extends to DCS; however, the question still remains whether DCS had a duty, in the instant case, to preserve the lost or destroyed files.

McWhorter, Martin, and Anderson involved statements by the victim or the defendant to DCS personnel. See generally Matthew Kirk McWhorter, 2004 WL 1936389; Cory James Martin, 2002 WL 927427; Ammon B. Anderson, 2001 WL 363984. Such evidence was directly related to the alleged sexual abuse at issue. Here, the State provided the Defendant with such direct evidence, including social worker Stanley Cook's report of his May 14, 2000 interview with the victim and the report from Our Kids Center concerning the April 4, 2002 interview and medical examination of the victim.

During the discovery phase of the trial, the Defendant additionally sought DCS' records (1) regarding Family Crisis Intervention in 1997; (2) a report made by an unidentified complainant in 1999 concerning suspected sexual abuse between the victim and her brother, Andrew Geary; and (3) reports of sexual abuse by the victim against her brother, Dwight Geary, in January of 2001. In

addressing DCS' duty to preserve the requested evidence, we find guidance in the jury instruction provided by our supreme court in Ferguson:

> The State has a duty to gather, preserve, and produce at trial evidence which may possess exculpatory value. Such evidence must be of a nature that the defendant would be unable to obtain comparable evidence through reasonably available means. The State has no duty to gather or indefinitely preserve evidence considered by a qualified person to have no exculpatory value, so that an as yet unknown defendant may later examine the evidence.
>
> If, after considering all of the proof, you find that the State failed to gather or preserve evidence, the contents or qualities of which are in issue and the production of which would more probably than not be of benefit to the defendant, you may infer that the absent evidence would be favorable to the defendant.

Ferguson, 2 S.W.3d at 917 n.11 (citations omitted and emphasis added).[10] The evidence requested by the Defendant concerns events that occurred before the Defendant was indicted and is not directly related to the allegations in the case at hand. To require DCS to preserve such collateral evidence would impose a duty on DCS to indefinitely preserve evidence "so that an as yet unknown defendant may later examine the evidence." Id. We question whether DCS might expect the requested evidence "to play a significant role in the suspect's defense." Trombetta, 467 U.S. at 488. However, in the absence of a complete record, we decline to disturb the determination of the trial court that DCS had a duty to preserve the records. See Oody, 823 S.W.2d at 559.

B. Remaining Ferguson Factors

Only if the proof demonstrates the existence of a duty to preserve and further shows that the State has failed in that duty must a court turn to a balancing analysis involving consideration of the following factors: "1. The degree of negligence involved; 2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and 3. The sufficiency of the other evidence used at trial to support the conviction." Ferguson, 2 S.W.3d at 917 (footnote omitted).

The trial court concluded that there was no evidence that the evidence was negligently destroyed. The trial court further noted, "DCS representatives testified that they have engaged in ongoing search efforts for the files." Again in the absence of a complete record, we will not disturb the trial court's determination that the loss of the records was attributable to simple negligence.

[10] In the present case, this instruction was not given because the trial court determined that a trial without the evidence was not fundamentally unfair.

Next, we must examine the "significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available" and "the sufficiency of the other evidence used at trial to support the conviction." Id. The significance of the destroyed evidence may have been considered slight if the Defendant was permitted to cross-examine the victim regarding her prior allegation of sexual abuse, as such would have constituted probative and reliable secondary or substitute. Moreover, the sufficiency of the evidence hinged almost entirely upon the truthfulness of the victim's testimony. As discussed above, the lack of a full and complete cross-examination of the victim was so fundamental as deny the Defendant his right to due process. We are unable to fully evaluate the remaining Ferguson guidelines under the circumstances due to the error of constitutional magnitude.[11]

IV. Tape of Telephone Conversation

As the Defendant's next issue, he contends the trial court "erred in allowing the State to play and introduce in its entirety[12] the taped conversation between the Defendant and Emily Pottebaum." Ms. Pottebaum, in cooperation with the police, telephoned the Defendant while he was in Kentucky. During this taped telephone conversation, the Defendant consistently denied any sexual contact with the victim. The Defendant uses crude language, however, and his statements reflect poorly on his overall character. Specifically, he argues:

> Repeatedly throughout the tape, [the Defendant] uses bad language, and talks about his own sexual proclivities. It paints a picture of [the Defendant] as being an ugly, perverted person. . . . Clearly the tape was a character assassination tool used by the District Attorney to turn the jury against [the Defendant]. . . .
>
> . . . There simply was no prior inconsistent statements on the tape. . . .

The State maintains that the tape was properly admitted under Rule 613, which permits the use of prior inconsistent statements to impeach a witness. We agree with the Defendant.

Extrinsic evidence of a prior inconsistent statement is inadmissible except under the terms of Tennessee Rule of Evidence 613(b), which provides as follows, "Extrinsic evidence of a prior

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[11] If the trial court determines that a trial without the missing evidence would not be fundamentally fair, then the trial court may dismiss the charges. Ferguson, 2 S.W.3d at 917. However, in Ferguson, our supreme court offered alternatives other than dismissal: "The trial judge may craft such orders as may be appropriate to protect the defendant's fair trial rights. As an example, the trial judge may determine, under the facts and circumstances of the case, that the defendant's rights would best be protected by a jury instruction." Id.

[12] The record reflects that the State had previously omitted from the tape references to "the fact that [the Defendant] was arrested for DUI, that he was allegedly involved in a similar allegation with a girl ten years ago in Clarksville, and one other reference about polygraph." Thus, the entire conversation was never presented to the trial court for its consideration.

inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Tenn. R. Evid. 613(b); see also State v. Reece, 637 S.W.2d 858, 861 (Tenn. 1982). The purpose of Rule 613(b) is to allow introduction of otherwise inadmissible extrinsic evidence for impeachment. State v. Martin, 964 S.W.2d 564, 567 (Tenn. 1998). When presented with a prior inconsistent statement a "witness then has several possible responses: the witness can admit, deny, or not remember making all or part of the statements." Neil P. Cohen et al., Tennessee Law of Evidence § 6.13[5][a] (4th ed. 2000). Extrinsic evidence of a prior inconsistent statement remains inadmissible when a witness unequivocally acknowledges having made the prior statement. Martin, 964 S.W.2d at 567; Cohen et al., at § 6.13 [5][a]. If the witness admits making the prior inconsistent statement, any extrinsic proof of the statement would be cumulative. The trial court's assessment of whether a statement is inconsistent will only be overturned if the trial court abused its discretion. Davis v. Hall, 920 S.W.2d 213, 217 (Tenn. Ct. App. 1995).

Prior to the cross-examination of the Defendant, the trial court ruled that the tape-recording was not admissible because of a reference therein to the Defendant "being in custody." The trial court did conclude that certain portions of the tape were relevant and, rather than playing the tape, would permit Detective Finchum to testify regarding to "his admitting he hit her, that he's not going to come back, that he knew a warrant was out and then go from there." Subsequently, the trial court ruled that the entire tape-recording was admissible[13] based upon the following colloquy that occurred during the cross-examination of the Defendant:

Q. Now you did have the opportunity to speak with detectives about this before charges were issued against you right?

A. Yes.

Q. You had the opportunity to tell your side of the story?

A. Yes.

Q. But you didn't take advantage of that; did you?

A. I did speak to the detectives.

Q. Well that was only after the detectives found you up in Kentucky and went up there to interview you, right?

A. Right.

[13] It appears from the record that the previous reference to "being in custody" which had earlier concerned the trial court had been redacted from the tape prior to its admission into evidence.

Q. That was like, what, a year-and-a half later?

A. Right.

Q. You knew there was an investigation for that year-and-a-half time period, right?

A. Emily told me they were looking into it.

Q. You knew all the way back in May of 2000 that [the victim] had made some allegations against you, correct?

A. Yes.

Q. All right. You knew, again, in August of 2000, when you had a telephone call with your - - with Emily Pottebaum that there were some serious allegations that were being made against you, correct?

A. Right.

Q. She told you the detectives wanted to speak with you, right?

A. Right.

Q. She told you that she'd give you the name of the detective. Tell us, what was your response to that, Mr. Pottebaum?

A. I told her I wasn't going to call nobody.

Q. Why?

A. They knew where I was. She called me. He could call me.

Q. What did you tell her to do?

A. What did I tell her to do?

Q. Yeah. What did you tell her to do with regard to the investigation?

A. (No response)

Q. I've got a better idea, Mr. Pottebaum. How about we listen to that conversation; how about that? You've heard it before right?

A. (No response)

Q. Right?

A. I told Emily to leave it alone and it's all - -

Q. How about we listen to the conversation, Mr. Pottebaum, so we get the full tenor of exactly what was going on; how about that?

A. I thought Emily was trying to drag me back here to get me arrested on domestic violence. I thought they [sic] was false - - false accusations - -

Q. How about we listen to the - -

A. - - if she would - -

Q. - - conversation, Mr. Pottebaum?

. . . .

A. I told her if she would leave it alone, it would all blow over, because there was - - it was false.

Q. All blow over so it would go away?

A. It would, because it was false.

. . . .

Q. If we'll just let it all sort of slide away, you can run up to Kentucky, hide out in Kentucky, and things will all just blow over, right?

A. I was not hiding out, everybody knew where I was. Emily called me; I answered the telephone. The detective came to Kentucky and talked to me. They knew where I was, I was not hiding.

Q. Finally. Finally.

A. I - -

Q. How did they know where you were then, Mr. Pottebaum? How did they know where you were?

. . . .

Q. Mr. Pottebaum, why did it take a year-and-a-half for the police to be able to get in contact with you finally?

A. I don't know, that's up to the police.

Q. No, they afforded you the opportunity to call them.

The trial court then ruled that the tape was admissible as a prior inconsistent statement. The trial court reasoned:

> [U]nfortunately, I think he's flat out opened the door to that, and that is, he says they knew where I was. You know, they could come get me.
>
> . . . .
>
> . . . I really think that tape has now become relevant to be heard. I'm going to overrule your objection about the cussing, I mean, because if he - - because he - - I mean, I heard it yesterday, and he has now said they knew where to find me. Well, they didn't know where to find him.

Although a statement need not directly contradict a proposition in order to be inconsistent, the extrinsic evidence must have a tendency to discredit the testimony of the witness. See Hunter v. Ura, 163 S.W.3d 686, 698 (Tenn. 2005); State v. Charles Thompson, No. W1998-00351-CCA-R10-CD, 2001 WL 912715, at *14 (Tenn. Crim. App., Jackson, Aug. 9, 2001); Cohen, et al., at § 6.13[3]. Moreover, the trial court may exclude evidence of the prior inconsistent statement if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or a risk of undue delay. Tenn. R. Evid. 403; Hunter, 163 S.W.3d at 698.

Here, on the tape, the Defendant repeatedly denied any sexual abuse of the victim and stated that he was not going to come to Nashville to be confined for domestic assault. Regarding his whereabouts, he stated, "they can get in touch with me." We conclude that the tape did not have a tendency to discredit the testimony of the Defendant and that the tape in its entirety was not inconsistent with the Defendant's trial testimony.

Even if some portion of the tape was inconsistent with the Defendant's trial testimony, it was only marginally so. Further, other portions of the tape suggest that the probative value of the evidence was substantially outweighed by unfair prejudice. See Tenn. R. Evid. 403. The Defendant's tone of voice, his reference to previously being incarcerated for domestic assault, his cursing, his description of masturbation acts, and his reference to the victim viewing he and her mother having intercourse on several occasions, all irrelevant issues or inadmissable evidence at trial, reflected poorly on the Defendant. See State v. Spike Hedgecoth, No. E2002-01869-CCA-R3-CD, 2003 WL 22668873, at *5 (Tenn. Crim. App., Knoxville, Nov. 12, 2003). Moreover, the State

engaged in extensive cross-examination of the Defendant regarding these specific parts of the tape. As noted by the trial court, Detective Finchum could testify to the relevant contents of the tape. We conclude that the trial court erred by allowing the State to introduce the tape-recorded telephone conversation.

V. "Open-Ended" Questions

The Defendant submits that it was error not to allow him "to present his explanation of the accusations by [the victim] and Emily Pottebaum, when on cross-examination the Assistant District Attorney, on numerous occasion, asked open ended questions for such an explanation." The proposed explanation included the victim's "false claims of abuse and the atmosphere of abuse within the household[.]" The responses which the trial court prohibited were matters which the trial court had already determined were not admissible.

For example, the State asked the following questions, which the Defendant found objectionable:

> Q. Gee, Mr. Pottebaum, here you are being falsely accused of these things. You offer up a half a dozen explanations for why these allegations are false, and the one thing that could establish your innocence, I'm never alone with her, there are other people always around, you never mention that. Does that strike you as kind of strange? Instead which [sic] you tell Emily Pottebaum is ain't no way what she says is true because I don't ejaculate like that. What's that all about, Mr. Pottebaum? What's that all about? [The victim's] making it all up because you don't shoot on your chest? What's that all about?[14]
>
> A. No, yesterday was the first thing I'd known about Andrew watching Emily's pornography tapes. When he was eight years old, Emily accused him of molesting [the victim]. If she's seen this thing - -
>
> Q. Mr. Pottebaum - -
>
> A. - - she's seen it with Andrew on the pornography tapes.
>
> . . . .
>
> Q. So you were so concerned about those aspects of your daughter's mental well being, her acting, her behaving, that you took an active role in parenting that way, right?

[14]The prosecutor was referring to comments the Defendant made during the tape-recorded telephone conversation with Ms. Pottebaum.

A. Right.

Q. Now how do we contrast that with your statements on the tape that your daughter's making these allegations about you, she's going to counseling, your wife's worried about her mental health and her well being, and you're basically saying, she don't [sic] need to go to no counseling, you're putting all these ideas in her head. How do you reconcile those two things? You're not going to come down and work on the investigation and square these things up? That doesn't make any sense, Mr. Pottebaum; does it?

A. Emily has told me she has been molested when she was a little girl - - she --

Q. Oh, yes. Now we can - -

A. - - somebody was sent to prison for statutory rape on Emily when she was a young girl.

Following defense counsel's objection to the form of questioning by the prosecutor, the trial court ruled that the Defendant's answers were non-responsive to the questions and amounted to an attempt to put into evidence matters already deemed inadmissible. The Defendant contends these "open-ended" questions were improper, and he should have been permitted to respond with his theory of defense, including evidence previously determined to be inadmissible.

Tenn. R. Evid. 611(a) provides, "[t]he court shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel." Tenn. R. Evid. 611(a). Under Rule 611(a), however, judges should allow counsel to present evidence and conduct the trial until there is an abuse of counsel's responsibility. Id. The Advisory Commission Comments state that Rule 611(a) "recognizes the inherent power of a court to control trial conduct to prevent lawyers from abusing the process." Id., Advisory Commission Comments. This means that counsel is permitted to ask questions that do not unduly waste time or do not encourage the jury to hear inadmissible evidence. See State v. Jasper Everett Stewart, No. W2000-01752-CCA-R3-CD, 2002 WL 1558591, at *4-5 (Tenn. Crim. App., Jackson, Jan. 4, 2002) (citing Cohen, et al., at § 6.11[8]) (analyzing narrative questions posed to an expert witness).

The propriety, scope, manner, and control of the examination of witnesses are within the sound discretion of the trial court. State v. Harris, 839 S.W.2d 54, 72 (Tenn. 1992). Here, we find no abuse of discretion by the trial court. Other than the references to certain portions of the tape-recorded conversation, the questions as posed by the State were not a waste of time, were relevant, and did not solicit inadmissible evidence. The trial court correctly ruled that the Defendant's answers were non-responsive, and the trial court was exercising its discretion to curtail non-responsive answers. See State v. Thacker, 164 S.W.3d 208, 229 (Tenn. 2005). This issue lacks merit.

VI. Sentencing

Finally, the Defendant, relying upon the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296 (2004), argues that his sentence was imposed in violation of his Sixth Amendment right to a trial by jury.[15] The Blakely decision holds that the Sixth Amendment to the federal Constitution permits a defendant's sentence to be increased only if the enhancement factors relied upon by the trial judge are based upon facts reflected in the jury verdict or admitted by the defendant. The only basis upon which enhancement would otherwise be permitted is the defendant's previous criminal history. The Tennessee Supreme Court has just recently considered the impact of the Blakely ruling on Tennessee's sentencing scheme and has concluded that the Criminal Sentencing Reform Act of 1989, under which the Defendant was sentenced, does not violate a defendant's Sixth Amendment rights. See State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005). Accordingly, the Defendant's argument on this basis has no merit.

CONCLUSION

Based upon the foregoing reasons and the record before this Court, we hold that the trial court committed prejudicial error by not allowing the Defendant to cross-examine the victim on the prior accusation of sexual abuse. We also find error in admission of the tape-recorded telephone conversation. Therefore, we reverse the judgments of conviction and remand the case for a new trial.

_____

DAVID H. WELLES, JUDGE

[15] The Defendant does not argue that the trial court improperly applied enhancement factors or that it failed to consider applicable mitigating factors. Given that the case is remanded for a new trial, we will not address the propriety of his sentence.